

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 01-CV-3849
	:	
v.	:	
	:	
HOWARD I. GREEN,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

October 22, 2002

Presently before the Court are Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. For the reasons stated below, Plaintiff's Motion for Summary Judgment is **GRANTED**, and Defendant's Cross-Motion for Summary Judgment is **DENIED**.

I. BACKGROUND

This present action (Green II) stems from Howard I. Green's ("Green") continual effort to avoid paying the taxes he owes. In the late 1970s and early 1980s, Green was president and chairman of the board of Fidelity American Financial Corporation and its three subsidiaries. Green substantially under-reported his federal income tax liabilities in the tax years 1979, 1980 and 1981.¹

1. A more detailed look at Green's machinations and troubles with the law can be found in United States v. Green, No. 96-7275, 1998 WL 167278 (E.D. Pa. Apr. 10, 1998) ("Green I") and United States v. Green, 201 F.3d 251 (3d Cir. 2000).

On October 9, 1991, the United States made an assessment against Green for unpaid income taxes, fraud penalties, and interest for the 1979-1981 tax period. The assessment was made pursuant to a Form 870-AD, executed by Green and his wife on June 25, 1991. The Form 870-AD provides that Green consented to the assessment and collection of the deficiencies with interest as provided by law. [Pl's Ex. 1].

In Green I, the United States sought to set aside as fraudulent a transfer of Green's interest in his residency to his wife in 1981 and to foreclose its tax liens against the property. See Green, 1998 WL 167278, at *1. The Eastern District of Pennsylvania held that the "transfer of the [p]roperty from Howard Green to himself and Mary Green shall be set aside as fraudulent and is invalid against the claims of the United States." Id. at *12. On appeal, the Third Circuit Court of Appeals affirmed the district court's finding that the conveyance of property was fraudulent. See Green, 201 F.3d at 251.

In order to prove its case in Green I, the United States submitted, *inter alia*, evidence of the 1991 assessments against Green in order to prove the existence of Green's tax liability. Green, however, did not challenge the validity of these assessments before the district court, nor did Green raise the issue on appeal. Additionally, the district court in Green I made the factual finding that by signing the Form 870-AD, Green "agreed to the amount of the assessments . . . and waived [his] right to challenge them." Green, 1998 WL 167278, at *6.

On October 9, 1998, this Court entered an order for the sale of the Green's residence by the United States Marshal for the Eastern District of Pennsylvania to satisfy outstanding federal tax liens. See United States v. Green, No. 96-CV-7275, 1998 U.S. Dist. LEXIS 16180, at *2 (E.D. Pa. Oct. 9, 1998). The Court ordered that the proceeds of the sale

should be distributed to the United States to satisfy federal tax liens in the amount of the then-current balance of \$662,139.83. See id. at *8. Though the sale of the Green’s residence did not bring in sufficient funds to satisfy all lien-holders, this Court did grant the United States \$16,714.89, “which amount represents a portion of Howard Green’s outstanding tax liability for unpaid income taxes for the years 1979, 1980 and 1981.” United States v. Green, No. 96-CV-7275, 2001 U.S. Dist. LEXIS 10313, at *2 (E.D. Pa. July 13, 2001).

On July 30, 2001, the United States filed this present action (“Green II”) seeking to reduce to judgment Green’s remaining outstanding tax liabilities for 1979-1981. The United States filed a motion for summary judgment. Green also filed a motion for summary judgment, arguing that the United State’s claims are barred by the principal of *res judicata* because “[a]ll actions should have been consolidated . . . instead of commencing a new suit on the same cause of action that was litigated originally.” [Def’s Mot. Summ. J.].

II. ANALYSIS²

A. *Res Judicata*

Green argues that the United States’ present action should be barred by the principles of *res judicata* or claim preclusion. Green’s position is that the United States could have brought this lawsuit as part of the suit to set aside the conveyance of Green’s residence as fraudulent (Green I), and because it did not, the United States is now foreclosed under the

2. In defendant’s brief in support of his motion for summary judgment, Green sets forth four separate “defenses.” Two of the “defenses,” specifically, the third and the fourth defense, are incomprehensible and are no defense at all. As a result, the Court will address Green’s remaining arguments of *res judicata*, the entire controversy doctrine, and the statute of limitations.

principles of *res judicata* from bringing this suit (Green II) to reduce the assessments to judgment.

“Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.” New Hampshire v. Maine, 121 S.Ct. 1808, 1814 (2001). “[R]*es judicata* or claim preclusion is designed to avoid piecemeal litigation of claims arising from the same events.” General Elec. Co. v. Deutz Ag., 270 F.3d 144, 157-58 (3d Cir. 2001). “[C]laim preclusion prohibits litigants from pursuing a matter that has not previously been litigated but which should have advanced in an earlier suit.” Id. at 157-58 n.5.

Application of *res judicata* requires “(1) a final judgment on the merits of the prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same causes of action.” United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984). Claim preclusion does not apply in the present case. Even though the first and second elements are not disputed, the third element is missing. Green II is not based on the same cause of action as Green I.

Two separate causes of action are deemed to be the same when “an essential similarity of the underlying events giving rise to the various legal claims” exists. Id. at 984. When determining whether two causes of actions are the same, courts will consider “(1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether

the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the *material* facts alleged are the same.” Id. (citations omitted).

Green I and Green II clearly are two separate causes of action, premised on different theories of recovery and each demanding a different form of relief. Green I involved a suit to set aside as fraudulent an April 1981 conveyance from Howard Green to Howard and Mary Green. In Green II, however, the United States seeks to reduce the outstanding tax assessments against Howard Green to judgment. As noted in the United States’ opposition to Green’s motion for summary judgment, the theory of recovery in Green I was premised on 26 U.S.C. § 7403, which governs actions to subject property to the payment of tax, and the actual fraud provisions of the Pennsylvania Uniform Fraudulent Conveyances Act. In contrast, Green II is premised on 26 U.S.C. § 7402, which grants federal district courts the authority to enter judgment on account of unpaid tax liabilities. [Pl’s Compl. at ¶3].

Additionally, both the evidence and material facts of Green I and Green II are different. In Green I, the United States introduced evidence of the conveyance of Green’s home and evidence that the conveyance was not made in accordance with the Greens’ antenuptial agreement. See Green, 1998 WL 167278, at *1. This evidence supported the material facts alleged in Green I that Green transferred his home to his wife for nominal consideration in an attempt to evade the payment of taxes. In contrast, the evidence and the material facts in Green II relate solely to Green’s remaining tax liability. The United States relies on both a Certified Form 4340, which is the Certificate of Assessment and Payments for Green for the periods 1979-1981, and a Form 870-AD, which is the Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment, as evidence of Green’s tax liability.

In short, the United States' present cause of action is not barred by the principles of *res judicata* because the present suit is not based on the same cause of action as Green I.

B. New Jersey's "Entire Controversy Doctrine"

Defendant also argues that New Jersey's "entire controversy doctrine" should apply to this case. The Court will not entertain this argument as New Jersey law does not apply to this case.

C. Statute of Limitations

Without citing any authority, Green also argues that the United States' action is barred by the statute of limitations. 26 U.S.C. § 6502(a), which governs collection after assessment, provides that a proper tax assessment "may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun within 10 years after the assessment of the tax." 26 U.S.C. § 6502(a). The assessment was made on October 9, 1991, and the present suit was brought on July 27, 2001. Thus, the actions falls within the applicable ten year time frame, and, as a result, the action is not time barred.

D. Green's continuing obligation to pay taxes

Also before the Court is the United States' motion for summary judgment regarding Green's liability for the taxes at issue. For the following reasons, Plaintiff's motion is granted.

In tax law, an assessment is entitled to a legal presumption of correctness. United States v. Fior D'Italia, Inc., 122 S.Ct. 2117, 2122 (2002). The United States levied an assessment against Green on October 9, 1991 for unpaid income taxes, fraud penalties, and interest. The assessment was made pursuant to a Form 870-AD, executed by Green and his wife

on June 25, 1991. The Form 870-AD provides that the Greens consented to the assessment and collection of the deficiencies with interest as provided by law. [Pl's Ex. 1]. Additionally, the district court in Green I made the factual finding that by signing the Form 870-AD, Green "agreed to the amount of the assessments . . . and waived [his] right to challenge them." Green, 1998 WL 167278, at *6.

The burden of correctness allows the United States to establish its prima facie case of tax liability by offering into evidence the Commissioner's assessment. See Psaty v. United States, 442 F.2d 1154, 1159 (3d Cir. 1971); Sadowski v. United States, 687 F. Supp. 966, 972 (E.D. Pa. 1988). Here, the United States has submitted both the Form 4340 and the Form 870-AD as evidence of Green's tax liability.

The burden of producing evidence to rebut the presumption of correctness is then on the taxpayer. Resyn Corp. v. United States, 851 F.2d 660, 663 (3d Cir. 1988). Green, however, fails to offer any evidence contradicting the correctness of the tax assessment against him. As such, there is no genuine issue of fact regarding the sum due to the United States.

III. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

An appropriate order follows.

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UNITED STATES OF AMERICA,	:	
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v.	:	
	:	
HOWARD I. GREEN,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 22nd day of October 2002, upon consideration of Plaintiff's Motion for Summary Judgment (Docket No. 7), Defendant's Cross-Motion for Summary Judgment (Docket No. 8), Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment (Docket No. 12), and Defendant's response thereto (Docket No. 17), it is hereby **ORDERED** that Plaintiff's Motion for Summary Judgment is **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED**. Judgment is entered for Plaintiff United States of America and against Defendant Green.

This case is **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.